A

Hamit bin Matusin & Ors v Penguasa Tanah dan Survei & Anor and another appeal

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO Q–01–18 OF 2001 AND NO Q–01–22 OF 2001
ABDUL KADIR SULAIMAN, TENGKU BAHARUDIN SHAH JJCA AND CLEMENT SKINNER J
24 MARCH 2006

C *Civil Procedure — Trial — Retrial — Parties agreed to be bound by findings of previous trial — Whether parties could submit on related issue at present trial*

D *Native Law and Custom — Land dispute — Customary rights over land — Whether land situated on river bank reserve — Sarawak Land Code (Cap 81)*

E These were appeals against the decision of the learned judicial commissioner ('JC') of the High Court in Miri, Sarawak made on 21 March 2001 after a retrial of seven consolidated suits between the parties therein concerning the plaintiffs' claims to native customary rights ('NCR') over certain plots of land situated at what was then known as Kampong Dagang, Miri which were taken possession of by the State and the houses thereon demolished to make way for commercial development of the area.

F The plaintiffs, by their respective writs filed in 1983, sought for a declaration that at all material times to the action, they had acquired NCR over their particular plots and were entitled to use and occupy them. They also claimed damages for wrongful deprivation of use and enjoyment of the plots. The State denied such alleged acquisition of NCR but admitted entry onto the plots and demolition of the houses in 1983.

G At the first trial in 1991 ('the previous trial'), evidence was led, without any objection by the plaintiffs, to the effect that the lands were in fact situated within a river bank reserve, on which no one could claim any title by virtue of the Sarawak Land Code (Cap 81) ('the Land Code'). However, upon the plaintiffs' objection to such evidence in their final submission at the conclusion of trial, the learned trial judge disregarded such evidence and made his findings of fact and law in the plaintiffs' favour and gave judgment as prayed for.

H On appeal to the Supreme Court in 1994, the judgment was set aside. Hence, a retrial was ordered. When the matter came up for retrial before the JC on 17 May 1994, the parties came to an agreement that the only issue for determination at the retrial was whether the plaintiffs' houses were on the river bank reserve. The evidence adduced in the previous trial on this issue was agreed to be incorporated as part of the evidence in the retrial and that parties be at liberty to adduce any further evidence relating thereto.

I On that basis, the JC found the houses of four of the plaintiffs outside the river bank reserve and allowed their claims. Three of them were the respondents in the State's

appeal. The other three houses were found to be within the river bank reserve, hence the rejection of the claim of the appellants in the co-plaintiffs' appeal. A

On the issue of NCR, the learned Deputy State Attorney General complained against the learned JC's refusal to open up the issue, being of the view that it is not related to the river bank issue. He submitted the fact that the State agreed to be bound by the findings in the previous trial did not mean that it could not submit on the issue of when the NCR was allegedly acquired by the plaintiffs, such issue being related to the river bank issue. B

Held, dismissing both the State and co-plaintiffs' appeals with costs: C

(1) The court found no fault in the learned JC's rejection of the 1964 survey determination of the Mean High Water Mark (MHWM) used in offsetting the plaintiffs' houses for its questionable accuracy, correctness and propriety. There was sufficient evidence to show that it was not carried out in accordance with the accepted practice at least pertaining to the requirement of proper tidal data for a period of at least one lunar month. Thus, the rejection of exh D1 and exh D4 as basis for determining whether or not the plaintiffs' houses were within the river bank reserve was totally justified (see para 14). D

(2) In view of the finding of the previous trial that the plaintiffs acquired the NCR on or before 1 January 1958 and the fact that the parties agreed to be bound by that finding and to confine the rehearing to the river bank issue only, there was no cause to fault the learned JC for disallowing such additional issues to be raised. It was in that context that the JC said the acquisition of NCR was not related to the river bank issue. The JC had otherwise stated in his judgment that the river bank issue was directly related to the issue of the plaintiffs' acquisition of NCR by virtue of the Land Code provision of s 38 (see para 18). E F

(3) There was a clear and specific finding of fact made by the learned trial judge that the plaintiffs acquired the NCR prior to 1 January 1958. And that finding was of course subject to those houses not being situated within the river bank reserve when acquired as the river bank issue was not considered. This therefore agreed with the learned deputy that the agreement on the finding of fact of the previous trial would not stand if this court finds the disputed plots to be within the river bank reserve, as no NCR would in law be created or acquired thereon by virtue of s 38 of the Land Code (see para 24). G

(4) There was no fault in the learned JC's appreciation of the evidence and assessment of the credibility of witnesses based on the totality of evidence. Based on all the evidence before him, including PW11's report on his analysis of the 1964 and 1977 photographs and the relevant tidal charts, he found the co-plaintiffs' houses at a point of time after 1 January 1958 to be within the river bank reserve. There was no cause for this court to interfere with such finding of fact as it was well grounded and accorded with the probabilities of the case. Contrary to the plaintiff's contention, the finding of fact of the learned JC was not inconsistent with the agreement of the parties on the further conduct of the trial and also not without regard to the state of pleadings (see para 32). H I

(5) The finding of the trial judge ought not to be disturbed unless supporting evidence is lacking or if some factual misapprehension of evidence is shown. In this case, no such shortcomings were detected in the disputed findings of the court below. There was therefore no justification for this court to intervene (see para 42).

(6) Failure of the co-plaintiffs' claim was not because they lost their NCR to the river bank reserve but because their claim for NCR was proven or was defeated by the provision of s 38 of the Land Code. The position of the other plaintiffs was not however affected as they enjoy the benefit of the best 1964 location in the absence of evidence to show otherwise (see para 43).

[Bahasa Malaysia summary

Rayuan-rayuan tersebut adalah terhadap keputusan pesuruhjaya kehakiman yang bijaksana ('PK') Mahkamah Tinggi, Miri, Sarawak yang dibuat pada 21 Mac 2001 selepas perbicaraan semula tujuh guaman yang disatukan antara pihak-pihak berikut yang berkaitan tuntutan-tuntutan plaintif-plaintif terhadap hak-hak adat anak watan ('HAAW') ke atas tanah tertentu yang terletak di suatu tempat yang dahulunya dikenali sebagai Kampong Dagang, Miri yang telah dimiliki oleh kerajaan negeri dan rumah-rumah di situ telah diruntuhkan untuk pembangunan komersial di kawasan tersebut.

Plaintif-plaintif, melalui writ-writ mereka yang masing-masingnya telah difailkan dalam tahun 1983, telah memohon satu deklarasi bahawa pada sepanjang masa material tindakan itu, mereka telah memperoleh HAAW ke atas kawasan tertentu itu dan berhak menggunakan dan menetap atasnya. Mereka juga menuntut ganti rugi kerana pelucutan yang salah terhadap penggunaan dan hak memperoleh plot tanah tersebut. Kerajaan negeri menafikan pemerolehan HAAW yang dikatakan itu tetapi mengakui telah memasuki plot-plot tanah tersebut dan meruntuh rumah-rumah tersebut dalam tahun 1983.

Dalam perbicaraan pertama pada tahun 1991 ('perbicaraan terdahulu'), keterangan telah dikemukakan, tanpa apa-apa bantahan oleh plaintif-plaintif, untuk mengatakan bahawa tanah-tanah tersebut pada hakikatnya terletak dalam kawasan rizab tebing sungai, yang manaiada sesiapa boleh menuntut apa-apa hak milik menurut Kanun Tanah Sarawak (Bab 81) ('Kanun Tanah tersebut'). Bagaimanapun, berdasarkan bantahan plaintif-plaintif terhadap keterangan sedemikian dalam hujah terakhir mereka di penutup perbicaraan, hakim perbicaraan yang bijaksana tidak mengendahkan keterangan sedemikian dan telah membuat penemuan fakta dan undang-undang beliau menyebelahi plaintif-plaintif dan menyampaikan penghakiman seperti yang dipohon.

Semasa rayuan ke Mahkamah Agong pada tahun 1994, penghakiman itu telah diketepikan. Justeru itu,satu perbicaraan semula telah diperintahkan. Apabila perkara tersebut didengar untuk perbicaraan semula di hadapan PK pada 17 Mei 1994, pihak-pihak telah bersetuju bahawa satu sahaja persoalan untuk dibicarakan di perbicaraan semula itu iaitu sama ada rumah-rumah plaintif-plaintif terletak atas tebing sungai yang dirizabkan. Keterangan yang dikemukakan dalam perbicaraan terdahulu berhubung persoalan ini telah dipersetujui untuk dimasukkan sebagai

sebahagian daripada keterangan dalam perbicaraan semula dan bahawa pihak-pihak bebas untuk mengemukakan apa-apa keterangan lain berkaitan dengannya.

Berdasarkan itu, PK itu mendapati rumah-rumah empat daripada plaintif-plaintif itu di luar rizab tebing sungai itu dan membenarkan tuntutan mereka. Tiga daripada mereka adalah responden dalam rayuan Kerajaan Negeri. Tiga lagi rumah–rumah itu didapati terletak dalam kawasan rizab tebing sungai, justeru itu tuntutan perayu-perayu ditolak dalam rayuan plaintif-plaintif bersama.

Berhubung persoalan HAAW, Timbalan Peguam Besar Negeri telah mengadu terhadap keengganan PK untuk membuka persoalan itu, kerana berpendapat ia tiada kaitan dengan persoalan rizab tebing sungai. Beliau berhujah bahawa fakta yang Kerajaan Negeri bersetuju untuk terikat dengan penemuan dalam perbicaraan terdahulu itu tidak bermaksud ia tidak boleh mengemukakan persoalan bila HAAW diperoleh oleh plaintif-plaintif tersebut, persoalan sedemikian itu adalah berkaitan dengan persoalan rizab tebing sungai.

Diputuskan, menolak kedua-dua rayuan-rayuan Kerajaan Negeri dan plaintif-plaintif bersama dengan kos:

(1) Mahkamah mendapati tiada apa yang salah dalam penolakan PK yang bijaksana terhadap keputusan kajian 1964 Mean High Water Mark (MHWM) yang digunakan untuk mengimbangi rumah-rumah plaintif-plaintif berhubung ketepatan dan kesesuaiannya yang dipersoalkan. Terdapat keterangan yang mencukupi untuk menunjukkan bahawa ia tidak dilaksanakan menurut amalan yang diterima sekurang-kurangnya berkaitan keperluan maklumat pasang surut yang betul untuk satu tempoh sekurang-kurangnya satu bulan. Oleh itu, penolakan eksh D1 dan eksh D4 sebagai asas untuk menentukan sama ada atau tidak rumah-rumah plaintif-plaintif terletak dalam kawasan rizab tebing sungai adalah dijustifikasikan (lihat perenggan 14).

(2) Berdasarkan penemuan perbicaraan terdahulu bahawa plaintif-plaintif memperoleh HAAW pada atau sebelum 1 Januari 1958 dan fakta bahawa pihak-pihak telah bersetuju untuk terikat oleh penemuan tersebut dan untuk membataskan perbicaraan semula itu kepada persoalan tebing sungai sahaja, tiada sebab untuk menyalahkan PK yang bijaksana kerana tidak membenarkan persoalan lain dibangkitkan. Dalam konteks tersebutlah PK itu mengatakan bahawa pemerolehan HAAW tidak berkaitan dengan persoalan tebing sungai. PK itu sebaliknya menyatakan dalam penghakimannya bahawa persoalan tebing sungai itu adalah secara langsung berkaitan dengan pemerolehan HAAW menurut peruntukan s 38 Kanun Tanah tersebut (lihat perenggan 18).

(3) Terdapat penemuan fakta yang jelas dan spesifik yang telah dibuat oleh hakim perbicaraan yang bijaksana bahawa plaintif-plaintif telah memperoleh HAAW itu sebelum 1 Januari 1958. Dan penemuan tersebut tertakluk kepada rumah-rumah itu tidak terletak dalam kawasan rizab tebing sungai apabila diperoleh kerana persoalan tebing sungai tidak dipertimbangkan. Oleh itu ini dipersetujui dengan timbalan yang bijaksana bahawa persetujuan berhubung penemuan fakta dalam perbicaraan terdahulu tidak kekal jika mahkamah ini mendapati plot-plot yang dipertikaikan adalah dalam kawasan rizab tebing

sungai, kerana tiada HAAW dari segi undang-undang akan dibentuk atau diperoleh menurut s 38 Kanun Tanah tersebut (lihat perenggan 24).

(4) Tiada yang silap dalam penilaian PK yang bijaksana terhadap keterangan dan penilaian kebolehpercayaan saksi-saksi berdasarkan keseluruhan keterangan. Berdasarkan semua keterangan di hadapan beliau, termasuklah laporan PW11 tentang analisisnya berhubung gambar foto 1964 dan 1977 dan carta pasang surut relevan, beliau mendapati rumah-rumah plaintif-plaintif bersama pada masa itu selepas 1 Januari 1958 terletak dalam kawasan rizab tebing sungai. Tiada sebab untuk mahkamah ini campur tangan dengan penemuan fakta tersebut kerana ia sejajar dengan kemungkinan kes tersebut. Bertentangan dengan hujah plaintif-plaintif, penemuan fakta PK yang bijaksana itu tidak konsisten dengan persetujuan pihak-pihak berhubung pelaksanaan perbicaraan seterusnya dan juga bukan tanpa mengambilkira keadaan pliding tersebut (lihat perenggan 32).

(5) Penemuan hakim yang bijaksana tidak patut diganggu kecuali keterangan sokongan tidak mencukupi atau jika terdapat salah anggap faktual keterangan yang ditunjukkan. Dalam kes ini, tiada kekurangan didapati dalam penemuan mahkamah bawahan yang dipertikaikan itu. Oleh itu tiada justifikasi untuk mahkamah ini campur tangan (lihat perenggan 42).

(6) Kegagalan tuntutan plaintif-plaintif bersama bukanlah kerana mereka kehilangan HAAW mereka kepada rizab tebing sungai tetapi kerana tuntutan mereka untuk HAAW dibuktikan atau digagalkan oleh s 38 Kanun Tanah tersebut. Kedudukan plaintif-plaintif lain bagaimanapun tidak terjejas kerana mereka menikmati kelebihan lokasi 1964 terbaik kerana ketiadaan keterangan untuk membuktikan sebaliknya (lihat perenggan 43).]

Notes

For a case on retrial, see 2 *Mallals' Digest* (4th Ed) Consolidated Subject Index para 6911.

For cases on customary rights over land, see 10 *Mallals' Digest* (4th Ed, 2002 Reissue) paras 632–639.

Cases referred to

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22 (refd)

Chartered Bank, The v Yong Chan [1974] 1 MLJ 157 (refd)

Henderson v Henry E Jenkins & Sons [1969] All ER 401 (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Jones v Mersey River Board (1958) 1 GB 143 (refd)

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627 (refd)

Ken Crossen Architects v Roturua District Council (1992) 2 NZRMA195 (refd)

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] MLJ 49 (refd)

Soon Hon Sen v Bong Khiuk Nyong [1975] 1 MLJ 75 (refd)

Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 87 (refd)

Yew Phaik Hoon v Quah Ooi Keat & Anor [1969] 1 MLJ 32 (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152 (refd)

Legislation referred to

Evidence Act 1950 ss 103, 104
Sarawak Land Code (Cap 81) ss 2, 10(2), 38(1)(a), (b), (h), 38(4), 44

Haji Abdul Razak Tready (Sapian Tarmizi with him) (Deputy Public Prosecutor, Sarawak State Attorney General's Chamber) for the appellants.
Mekanda Singh Sandhu (Satinder Singh Sandhu with him) (Sandhu & Co) for the respondent.

Tengku Baharudin Shah JCA (delivering judgment of the court):

[1] These are appeals against the decision of the learned judicial commissioner ('JC') of the High Court in Miri, Sarawak made on 21 March 2001 after a retrial of seven consolidated suits between the parties therein concerning the plaintiffs' claims to native customary rights ('NCR') over certain plots of land situated at what was then known as Kampong Dagang, Miri which were taken possession of by the State and the houses thereon demolished to make way for commercial development of the area. The Superintendant of Land & Survey and the State Government of Sarawak are the appellants in Appeal No Q–01–22 of 2001 ('the State's Appeal') and respondents in Appeal No Q–01–18 of 2001 (the co-plaintiffs' appeal) while the respondents in the former and the appellants in the latter were the plaintiffs in the court below. By consent of the parties, we heard both the appeals together and this is our decision.

BACKGROUND

[2] The plaintiffs, by their respective writs filed in 1983, sought for a declaration that at all material times to the action, they had acquired NCR over their particular plots, as shown and described in the Annexure A to their statements of claim and were entitled to use and occupy the same. They also claim damages for wrongful deprivation of use and enjoyment of the said plots. The State, without condescending to particulars, denied such alleged acquisition of NCR but admitted entry onto the said plots and demolition of the houses thereon in 1983.

[3] At the first trial in 1991 (the previous trial), evidence was led, without any objection by the plaintiffs, to the effect that the said lands were in fact situated within a river bank reserve, on which no one could claim any title by virtue of the Sarawak Land Code (Cap 81) ('the Land Code'). However, upon the plaintiffs' objection to such evidence in their final submission at the conclusion of trial, the learned trial judge disregarded such evidence and made his findings of fact and law in the plaintiffs' favour and gave judgment as prayed for.

[4] On appeal to the Supreme Court in 1994, the said judgment was set aside. From its judgment, the Supreme Court appears to view the excluded evidence to be a mere development of the pleaded defence and that the plaintiffs, in the circumstances of the said proceedings, were in no way prejudiced or surprised by the more specific evidence adduced, as such, the court was deprived of an opportunity of

considering, on appeal, the learned trial judge's conclusion and reasons therefor on such alleged defence, which would have been available had such evidence not been excluded. Hence, a retrial was ordered.

[5] When the matter came up for retrial before another judge on 17 May 1994 the parties, through their respectice counsel, came to an agreement that the only issue for determination at the retrial is whether the plaintiffs' houses were on the river bank reserve. The evidence adduced in the previous trial on this issue was agreed to be incorporated as part of the evidence in the retrial and that parties be at liberty to adduce any further evidence relating thereto. It was further agreed that all findings of fact and law in the previous trial shall be binding on the parties in so far as they are relevant. The parties would first adduce evidence that the houses were not on the river bank reserve which would then be rebutted by the defence. The State was thus ordered to file an amended defence to plead the river bank issue, which was duly complied with by the State relying on Section 38 of the Land Code.

[6] The retrial proper was subsequently conducted before the learned JC, who after hearing further evidence, holds the view that the question whether the plaintiffs' houses were within the river bank reserve is related to the issues of the plaintiffs' acquisition of the NCR over their respective plots, hence he was faced with two questions to be answered first, that is, the period when determination is to be made and who bears the burden of proof that the houses were within the river bank reserve. He rejects the plaintiffs' contention that the relevant period for such determination is 4 May 1983, the date when the plaintiffs' houses were demolished. The State contends that it should be the date of the plaintiffs' purported acquisition of the customary right. The learned JC, instead, adopts the view that the river bank issue should be determined at two points, firstly at the time when the NCR was alleged to have been acquired and secondly, if such rights were so acquired the determination of the issue may be made at any time after such acquisition. In view of the finding of fact of the previous trial that the plaintiffs had acquired NCR over their respective plots, he concluded that the first relevant period was on or before 1 January 1958, as no NCR can be created or acquired, other than by way of transfer, gift or occupation, thereafter. And if such NCR was acquired, then the second period is at any time after such acquisition, for on becoming a river bank reserve such right shall cease to subsist. With regard to the acquisition of the NCR, he found no evidence adduced by both parties as to when such rights were first acquired.

[7] Following *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627, the court also held that the onus is on the State to prove that the houses were within the river bank reserve. After analysing the testimonies of witnesses, the learned JC rejected the State witnesses' mode of determination of the river bank for being inappropriate, inaccurate and questionable to be relied on as basis for determining the river bank reserve. He also found the plaintiffs' witness PW10 wanting on the issue, but he clearly shows preference for PW11's analysis and finding as contained in his report exh P20 which he accepted as accurate. On that basis, he found the houses of four of the plaintiffs outside the river bank reserve and allowed their claims. Three of them are the respondents in the State's appeal. The other three houses were found to be within the river bank reserve, hence the

rejection of the claim of the appellants in the co-plaintiffs' appeal.

THE STATE'S CASE

[8] The State cites seven grounds of appeal but the learned Deputy State Attorney General who appeared before us on 21 January 2004 decided to lump them into four, two on the river bank issue, one on the acquisition of NCR and lastly on the legal impediment to any acquisition of such NCR over the said plots. The State contends that the period when the plaintiffs acquired such rights is related to the river bank issue. We do not see any cause for complaint here as that is the very stand taken by the learned JC right from the start when he said in his judgment at p 6 as follows:

> The question as to whether or not the plaintiffs were within the river bank reserve is in my opinion directly related to the issues on the acquisition of native customary rights by the plaintiffs. It is clear that the defendants in their amended defence denied the acquisition of any native customary rights by the plaintiffs by virtue of s 38 of the Land Code (Cap 81).

Let us now look into the issues raised.

[9] The learned Deputy submits that the evidence relating to Mean High Water Mark ('MHWM') ought to have been disregarded in determining the extent of the boundary of the river bank reserve as s 38(1)(b) of the Land Code makes no provision for it. This is in contrast to the express provision relating to land adjoining the sea coast under s 38(1)(a). The court is urged to give the word 'banks' its ordinary meaning to mean 'so much of the land adjoining or near to a river as performs or contributes to the performance of the function of containing the river' — per Jenkins LJ in *Jones v Mersey River Board* (1958) 1 GB 143 at p 153. The learned JC is said to have wrongly ignored DW5's evidence that for photogrammetric mapping, the physical boundary of the river bank should be determined by reference to the 'mean sea level' which is the land survey datum. By referring to MHWM, the subject area, according to DW5, would be flooded.

[10] It is also submitted that the black curve line indicating the river bank in exh D1 was correctly plotted from the aerial photograph (exh D3) taken in 1964. The river bank reserve is said to be determined by digitising exh D1 into photogrammetric map as in exh D4 by DW5 who also testified that MHWM was not significant because the area of interest was along the river bank, not the sea shoreline. For such mapping, height control points were used. The learned JC is said to have, by only alluding to a certain accepted practice relating to tidal data over a period of time to determine the MHWM, failed to draw reasonable inference on evidence of height control points used for photogrammetric mapping. In any event both, DW3 and DW5 assumed the river bank boundary in exh D1 was correct because land surverying is more accurate than photogrammetric mapping; and to this PW11 agreed under cross-examination that if the survey technique was carried out properly, it would be more accurate than the phtogrammetric method.

[11] For ease of reference s 38 of the Land Code reads as follows:

38 (1) Save where express provision is made to the contrary in any document of title by any general or special direction of the Minister, all unalienated land situate within the limits stated below shall be reserved to the Government, and no one may acquire a title to the same or any part thereof —

(a) all land adjoining the sea coast within sixty-six feet of mean high water mark;

(b) all land within sixty-six feet on each side along the banks of all navigable rivers, streams, canals or creeks;

Provided where the width of any such stream, canal or creek is less than thirty-three feet, the reserve on each bank shall be twice the width of the stream, canal or creek;

(2) (not relevant)

(3) (not relevant)

(4) Any building erected, or crop planted, upon the land reserved to the Government under subsection (1) and (2) shall be liable to be recovered by order of the Director without payment of any compensation.

(5) (not relevant).

[12] While it is true that the law provides for MHWM as the measuring stake to determine the sea coast reserve, no provision is made for the manner to demarcate the boundary of a river bank or reserve. To adopt Jenkins LJ's definition of the word 'banks' in *Jones v Mersey River Board*, as suggested by the learned d,eputy, would appear to be ideal in most circumstances but is apparently not practically helpful in this case. According to DW3, the river bank would be identified by the edge of vegetation before certain change of the terrain of the land but in this instance there is no clear definition of the edge of the river bank as such to adopt the edge of vegetation method the road would possibly be in the river bank reserve. Because of that the MHWM was adopted to establish the river bank and determine the bank reserve as sixty-six feet from the same. The State thus relied on exh D1 produced by DW3 in which a black curve line is plotted to mark the river bank with sixty-six feet offset therefrom landwards to place all the plaintiffs' houses within the river bank reserve. Exhibit D1 is based on a 1964 physical land survey conducted by the Department of Lands and Survey using the MHWM adopted from an observation of a series of high water marks in the area for one week. It is common ground that land survey is more accurate than photogrammetric mapping provided the survey technique was carried out properly.

[13] In view of the State's reliance on exh D1, it would be futile to its case if evidence of MHWM is to be disregarded as suggested. More so when the river bank reserve in DW5's photogrammetric map exh D4 is also determined by digitising exh D1. DW5 himself admitted in cross-examination that the validity of exh D4 depends on the accuracy of the river bank in exh D1 and that an error of 70ft away from the shore could put the plaintiffs' houses outside the river bank reserve.

[14] Be that as it may, we find no fault in the learned JC's rejection of the 1964 survey determination of the MHWM used in offsetting the plaintiffs' houses for its questionable accuracy, correctness and propriety. There is sufficient evidence to show that it was not carried out in accordance with the accepted practice at least pertaining

to the requirement of proper tidal data for a period of at least one lunar month. Thus, the rejection of exh D1 and exh D4 as basis for determining whether or not the plaintiffs' houses were within the river bank reserve is totally justified.

[15] In the light of the aforesaid circumstances, the learned counsel for the plaintiffs is not wrong to say that the State is acting inconsistent with its stand in the court below. Nevertheless, what is more significant, as pointed out by learned counsel, is that MHWM though considered by the learned JC is not crucial to his decision which, as we shall see later, does not at all rely on MHWM.

[16] The learned deputy then submits that no weight should be given to plaintiffs' determination of the edge of dry land on the river bank as per exh P20, because it is plotted further outward than the boundary of the river bank as pleaded in Annexure A to the amended statement of claim. He says the plaintiffs are bound by such pleadings and cites the cases of *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22, *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152, *Soon Hon Sen v Bong Khiuk Nyong* [1975] 1 MLJ 75 and *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 in support. With respect, we agree with the learned counsel for the plaintiffs that there is no assertion in the amended statement of claim of each plaintiff (see paras 2 and 3.1 and prayer 1) on the location of the river bank nor is there any indication as to its position by the legends in the plan referred in Annexure A so as to constitute an admission on the position of the river bank. On the contrary, the legends in each Annexure A clearly describe the dark boundary line encompassing the disputed plots in the plan as 'Phase IV Development Area of Kampong Dagang, Miri' which is self explanatory.

[17] On the issue of NCR the learned deputy complains against the learned JC's refusal to open up the issue, being of the view that it is not related to the river bank issue. He says the fact that the State agreed to be bound by the findings in the previous trial does not mean that it could not submit on the issue of when the NCR was allegedly acquired by the plaintiffs, such issue being related to the river bank issue. He contends that there could be no valid acquisition if the plots were within the river bank reserve within the terms of s 38(1)(h) of the Land Code. The validity of the acquisition of such NCR is said to depend on the applicable law at the date of such acquisition. After analysing the effect of several legislation concerning Mixed Zone Land and Native Area Land, it is contended that the NCR in this case could only be validly acquired before 2 November 1956 and not thereafter.

[18] We appreciate the State's concern on this issue because of the plaintiffs' contention that the material date for determination of the river bank issue should be the demolition date in 1983. However, in view of the finding of the previous trial that the plaintiffs acquired the NCR on or before 1 January 1958 and the fact that the parties agreed to be bound by that finding and to confine the rehearing to the river bank issue only, we find no cause to fault the learned JC for disallowing such additional issues to be raised. It is in that context that he said the acquisition of NCR is not related to the river bank issue. As the learned JC himself otherwise states in the

earlier quoted passage of his judgment, the river bank issue is directly related to the issue of the plaintiffs' acquisition of NCR by virtue of the Land Code provision of s 38.

[19] As his last ground, the learned deputy emphasises that the plaintiffs could not in law or equity claim adverse possession over the said land relying on s 44 of the Land Code. For that reason, he says, the plaintiffs could not acquire the NCR after 1 January 1958, and therefore the learned JC is incorrect to stop the State from raising such defence which is pleaded. We are not persuaded. For the same reasons given on the earlier ground we find no merit in this argument. Parties are bound by the judicial admission and by their agreement as to the subsequent conduct of the retrial.

THE CO-PLAINTIFFS' CASE

[20] In respect of the co-plaintiffs' appeal, learned counsel affirms that parties are bound by the findings of the previous trial and must confine the retrial to the river bank issue only. From the judgment of the previous trial, he says, there is a clear finding of fact that the *plaintiffs had acquired NCR over their plots* of land on which their houses were situated *up to the date they were dispossessed of* these lands and their houses demolished on 4 May 1983. It is submitted that these facts so agreed constitute judicial admission which are binding upon the parties and need not be proven at retrial — see *Sarkar on Evidence* (14th Ed) at p 912. It is also contended that the State is estopped from advancing any other grounds to exclude *NCR which were found to have been acquired by the plaintiffs as on 4 May 1983* other than by the plea that the plots of land were within the river bank reserve.

[21] The learned deputy's reply is that the agreement on finding of facts would not stand if the court finds the area to be within the river bank reserve as no NCR could be created or acquired thereon. He says the agreement cannot stand in the face of the law — see *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 (PC).

[22] While we agree with the learned counsel that the judicial admission and the agreement to confine the retrial to the river bank issue bind the State not to advance any other grounds to exclude the plaintiffs' acquisition of NCR, it appears to us that the finding as stated by learned counsel does not reflect the true finding of facts of the previous trial read in its proper perspective.

[23] The learned judge in the previous trial considered two central issues before him, firstly whether the plaintiffs (through their predecessors) have acquired NCR over lands on which their houses were situated; and secondly, if answered in the positive, whether they were permitted by their native custom to part with or transfer them to others within the same community. He answered both questions in the positive, and in respect of the first, he based his finding on certain facts be found not disputed or challenged in the trial. One such fact is that NCR claimed over those lands by the plaintiffs were created prior to 1 January 1958 by occupation or building of houses (see p 213 of the appeal record). Excluding the river bank issue from his

consideration, he held the NCR to subsist until the dispossession and demolition of the houses. It is in that context that the learned judge came to his finding quoted as follows (see p 219 of the appeal record):

> From the oral and documentary evidence the plaintiff, in my view, had discharged the burden of proof on a balance of probability that they had acquired customary rights over the plot of lands at Kampong Dagang on which their houses were situated and they were not duly compensated as provided by law when the defendants took back prossession of the lands and the houses were demolished.

[24] To our mind, there is a clear and specific finding of fact made by the learned trial judge that the plaintiffs acquired the NCR prior to 1 January 1958. And that finding is of course subject to those houses not being situated within the river bank reserve when acquired as the river bank issue was not considered. We would, in the circumstances, therefore agree with the learned deputy that the agreement on the finding of fact of the previous trial would not stand if this court finds the disputed plots to be within the river bank reserve, as no NCR would in law be created or acquired thereon by virtue of s 38 of the Land Code.

[25] Learned counsel next refers to the onus of proof. He states that the court correctly concluded from the agreement of parties and the state of pleadings that the burden of proof is on the State to prove that the plots of land were within the river bank reserve. He submits that by reason of the judicial admission the State accepted as a fact that the plaintiffs had NCR over the plots of land at the time they were dispossessed and assumed the evidential burden of avoiding the said admission by proving that these lands were at all material times in the river bank reserve. Refer *Henderson v Henry E Jenkins & Sons* [1969] All ER 401. As a consequence of the court's rejection of the evidence of DW3, DW4 and DW5 on the river bank issue, it is contended that the State failed to discharge the burden to prove that the lands were within the river bank reserve and the court ought to have entered judgment against the State without looking at the evidence adduced by the plaintiffs because the onus did not shift to the plaintiffs — see ss 103 and 104 of the Evidence Act 1950.

[26] Alternatively, it is submitted that if the court below was entitled to look at the evidence adduced by the plaintiffs on the river bank issue, it erred in deciding the issue upon the evidence of the river bank boundary in 1964 without regard to the state of pleadings and the agreement between the parties on the further conduct of the retrial.

[27] The learned deputy does not question the onus of proof on the State but he argues that the learned JC did not reject the evidence led by the State to determine the river bank reserve. Only the accuracy, correctness and propriety of the 1964 survey to determine the MHWM were held to be questionable. In fact the learned JC did refer to and thus rely on the evidence adduced by DW3 in respect of the 1964 aerial photograph exh D3 when that exhibit formed the basis of PW11's analysis in his report exh D20 which the learned judge adopted in his said judgment.

[28] Parties should abide by their agreement on the conduct of the retrial. On the mode of trial, it was before the commencement of the retrial agreed that the plaintiffs would first adduce evidence that the houses were not on the river bank reserve which would then be rebutted by the defence. It is apparent that the parties have agreed to shift the burden on the plaintiffs to prove the negative and for the State to rebut with the positive averments. In such situation, the truth must be found in the evidence led by the parties and not on some abstract consideration of onus. As stated by the authors of *Sarkar on Evidence* (15th Ed) at p 1449:

> The question of onus of proof has greater force in an original trial, where the question is which party is to begin. But where the trial has ended, and where the plaintiff has let in evidence on his own behalf the contention that the *onus* was wrongly thrown loses all its force in an appeal.

And later on the same page on burden of proof and *onus probandi*:

> The question of *Onus probandi* is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led, for then the party on whom the onus lies to prove a fact must fail. Where, however, evidence has been led by the contesting parties, abstract consideration of onus are out of place and truth or otherwise must always be adjudged on the evidence led by the parties.

[29] The learned deputy is therefore correct to say that the outcome of the trial below does not depend entirely on the evidence led by the State alone as this is not a case where no evidence at all was given by the State. We also agree with his submission that the learned JC did not totally reject the evidence led by the State to determine the river bank reserve. He only questioned the accuracy, correctness and propriety of the 1964 survey to determine the MHWM used in offsetting the plaintiffs' houses as a result of which he found the river bank plotted in exh D1, produced by DW3, and consequently exhD4, the photogrammetric map was prepared by DW5, could not be used as a basis in determining whether or not the plaintiffs' houses were within the river bank reserve. The learned JC is perfectly correct in holding that he was not precluded from evaluating and looking at the evidence led by the plaintiff in making his finding on the river bank issue.

[30] The learned JC made his own assessment of the evidence of each witness called by the parties to support their respective versions of the extent of the river bank reserve. He found DW3's river bank, represented by the black curve plotted in exh D1, to be based on the MHWM of the tidal waters in the area taken from the data of a land survey conducted in 1964. Using the method adopted by other jurisdiction for the determination at MHWM as guide, he found the accuracy, correctness and propriety of the 1964 survey to be questionable as basis for offsetting the plaintiffs' houses because it was not carried out in accordance to or in compliance with certain accepted practice such as the requirement to have a tidal data from a reference station where an automatic tidal gauge is in continuous operation and data from a control station where automatic tide gauge has been established at some time in the past for at lease one lunar month or preferably six months from which tidal data is available. DW4 testified that three of the houses were right on the river bank, three within the river bank reserve and the remaining one outside the reserve. But the measurement was taken from the nearest part of the houses to the river bank marked

as the black curve in exh D1. In view of the earlier finding, the survey works conducted by DW4 was also found to be improper and inaccurate. DW5 relied on photogrammetric map exh D4 which he produced from aerial photographs taken in 1964. Since the river bank reserve therein was also determined by digitizing exh D1 into the photogrammetric map, exh D4 was also found to be unsuitable to be used as basis for determining the river bank reserve.

[31] Of the plaintiff's witness PW10, the learned JC found, based on DW5's evidence, that the methodology applied by him in providing the composite map exh D4 to be erroneous, thus rendering his analysis and the conclusion reached in term of the river bank reserve, to be inaccurate and not to be given any weight. PW11 used and analysed the aerial photographs of the affected area taken in 1964 and 1977, and the tidal charts of Miri Port/Sungai Miri for the same years, to locate the edge of dry land or tidal shorelines. He plotted the edge of dry land for both such periods and used such tidal shorelines to offset the river bank reserve. PW11's technique seems to find favour with the learned JC who was clearly satisfied with his explanation in respect of the method he used and his finding as contained in exh P20. From his analysis of the 1964 photograph, he located four of the plaintiffs' houses outside the river bank reserve and the three co-plaintiffs' houses within the river bank reserve. Analysis of the 1977 photographs puts all the plaintiffs' houses outside the river bank reserve.

[32] We note from the appeal records that only PW10, DW5 and PW11 testified before the learned JC in the retrial. The assessment of the evidence of DW3 and DW4 was based on the record of their testimony in the previous trial which was agreed to be adopted for the retrial. Be that as it may, we find no fault in the learned JC's appreciation of the evidence and assessment of the credibility of witnesses based on the totality of evidence. Based on all the evidence before him, including PW11's report on his analysis of the 1964 and 1977 photographs and the relevant tidal charts, he found the co-plaintiffs' houses at a point of time after 1 January 1958 to be within the river bank reserve. There is no cause for us to interfere with such finding of fact as it is well grounded and accords with the probabilities of the case. Contrary to the plaintiff's contention, and as adverted to earlier, the finding of fact of the learned JC is not inconsistent with the agreement of the parties on the further conduct of the trial. And we shall shortly see that it is also not without regard to the state of pleadings.

[33] The learned counsel's remaining complaint is against the finding of the learned JC that the river bank reserve could be determine at any given moment of time by holding that the plaintiffs' NCR shall cease or determine if it is proven that the plots were, at any time on or before 1 January 1958 or at any time thereafter, located within the river bank reserve (see p 31 of the appeal records). This finding is said to be contrary to the judicial admission. It is suggested that since the State in its pleadings admitted entry onto the lands and demolition of the houses thereon on 4 May 1983, at the same time relying upon the assertion that the lands were within the river bank reserve, the plaintiffs' cause of action arose when the State denied the plaintiffs' right by such entry and demolition, as such the date for determination of the river boundary ought to be 4 May 1983 when the cause of action arose. It is also

A submitted that the effect of the agreement between the parties is to bind the trial court to hold that the plaintiff had NCR over the said lands on 4 May 1958 making the said date the material date for determining whether the plaintiffs' houses were within or outside the river bank reserve.

B **[34]** Consequently, the learned JC is alleged to have erred in raising an issue which was at variance with the factual position agreed by the parties and deciding against the co-plaintiffs on such issue. Reliance is placed on the decision in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 where Sharma J said (at p 197):

C > The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties …. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts.

D **[35]** The learned deputy countered that there is the finding in the previous trial, as adverted to earlier, that the NCR was acquired prior to 1 January 1958 as such the date for determination of the river bank issue shall be the date of acquisition of such rights found by the learned Judge and accepted by the learned JC.

E **[36]** Let us first see the pleaded case of the parties. By para 3 of its amended statement of defence, the State denies the plaintiffs' ownership of the plots claimed on the ground that the same 'were within the river bank reserve as provided under s 38 of the Land Code 9 (Cap 81).' This is to say that NCR could not be created or acquired over those lands by virtue of their being within the river bank reserve which is State land. In para 8 of their amended statement of claim, the plaintiffs allege that their houses were demolished by the State although their NCR have not been

F extinguished and were still subsisting. In reply thereto the State denies that the plaintiffs had any NCR therein and avers that no extinguishment of such right was necessary in the circumstances repeating its earlier denial referred to in para 3. The effect of that defence is to say that when the State entered and demolished the houses in 1983, no extinguishment of NCR was necessary as there was no NCR subsisting over them and no NCR can be acquired over the same because they were

G within the river bank reserve.

[37] What then are the findings of fact in the previous trial that the parties agreed to be bound by. As indicated in the earlier paragraphs of this judgment, there is a specific finding by the learned Judge in the previous trial, based on the undisputed

H and unchallenged evidence, that the plaintiffs have acquired NCR over their respective plots before 1 January 1958. And that NCR subsists until 1983 when the houses thereon were demolished. Such finding must be seen in the light of the fact that it was made pursuant to the plaintiffs' claim for a declaration that the said plots were at all material times NCR lands of the plaintiffs and that it was made without

I consideration of the river bank issue raised in defence. When the parties agreed to be bound by such finding with the State directed to amend its defence to incorporate the river bank issue, the finding must be read subject to the amended defence put in place. It must fall if the defence is proven and accepted. Otherwise it defeats the very purpose of amending the defence and there would no longer be any need for a retrial as the issue would have been determined. Likewise, the plaintiffs would not have

pleaded in reply (see para 2B) putting the onus on the State 'to establish that the said plots of land were situated within the river Bank reserve prior to 24 April 1954.' The reply is certainly not consistant with learned counsel's submission.

[38] In the circumstances therefore, the learned JC is not at variance with the facts agreed by the parties when he held that two periods need to be considered for determining the river bank issue. He puts the first period as on or before 1 January 1958 after considering the relevant laws applicable to Sarawak because NCR can only be first created or acquired, other than acquisition by way of transfer, gift or occupation, on or before that date. It is also the finding of the previous trial, presumably for the same reason and for lack of evidence as to when before that date the plaintiffs actually acquired NCR. The State would therefore succeed in its defence if it is proven that the plaintiffs' houses were within the river bank reserve before 1 January 1958 because no NCR could be acquired. We cannot find fault in that.

[39] For the second period the learned JC holds the view that if NCR have been acquired over the said lands such rights cease or determine upon the land becoming reserve land, as such the State can also succeed if it can prove that the said lands were or are within the river bank reserve at any period of time after such acquisition. He relies on s 10(2) of the Land Code which provides that no person whether a native or non-native may occupy any native customary land or any reserved land save under and in accordance with the conditions applicable thereto in any written law. It also deems any person in occupation thereof to be in unlawful occupation of State land. We find no reason to disagree. It is for the plaintiffs to show that they have satisfied such conditions and were not unlawfully occupying State land which they fail to do. It is pertinent to note that s 38 of the Land Code not only turns the river bank into reserved land but also provides for the removal of any building erected or crop thereon without payment of compensation (see s 38(4)).

[40] For the same reasons, the material date for determining the river bank issue cannot be 4 May 1983. That would be contrary to the pleadings as well as the agreed facts.

[41] The next point raised by learned counsel concerns accretion. He says the statutory provision of s 38(1)(b) of the Land Code could not have contemplated a permanent boundary because it is common knowledge that land adjoining a tidal river is subject to change by erosion or accretion. Since the river bank boundary is movable it is suggested that the determination of the river bank reserve should be at water level at a fixed point of time, meaning, at the time its occupation becomes an issue — in this case when the plaintiffs were dispossessed. Reliance is placed on the New Zealand case of *Ken Crossen Architects v Roturua District Council* (1992) 2 NZRMA195. We do not wish to go into the facts of that case as we find the issue therein irrelevant in view of the agreement of the parties in this case, the distinguishable facts and pleadings and the statutory prohibitions against occupation of State land (see ss 2, 10 and 44 of the Land Code).

CONCLUSION

[42] As a matter of principle, an appellate court is slow to interfere with the findings of fact arrived at by the trial court with whom the law entrusts the primary

task of evaluating the evidence. It would only intervene if convinced that there was no judicial appreciation by the trier of fact of the evidence adduced at the trial, or the audio-visual advantage enjoyed by the trial judge could not be sufficient to explain or justify his conclusion. There is a heavy onus on the party who seeks to displace such conclusion — see *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 (PC). In another Privy Council case of *Yew Phaik Hoon v Quah Ooi Keat & Anor* [1969] 1 MLJ 32, it is also held that the finding of the trial judge ought not to be disturbed unless supporting evidence is lacking or if some factual misapprehension of evidence is shown. As we have shown in the preceeding paragraphs of this judgment, no such shortcomings are detected in the disputed findings of the court below. There is therefore no justification for us to intervene.

[43] There is however one pertinent point which bothers us. It is not alluded to by either party in the course of submission nor would it really affect the outcome of these appeals though it would give a different colour to the decision. It is this. The learned JC made a finding of fact that the co-plaintiffs' plots of land were at a point of time after 1 January 1958 within the river bank reserve. Without saying so, he is implying that they are caught by the second period for determination of the river bank issue, in that having acquired NCR over their plots before 1 January 1958, they lost the NCR sometime in 1964 upon proof that the plots were then within the river bank reserve. While this may be the logical inference from the finding of fact derived from the judicial admission and the adoption of PW11's 1964 river bank reserve analysis, such inference lacks supporting evidence. In the first place, with no evidence adduced to prove when NCR were first acquired by the plaintiffs, it is not established whether or not such plots were then within the river bank reserve. The fact that the co-plaintiffs' plots were within the river bank reserve in 1964 does not prove that they were not so located before 1958 as to enable the NCR to be acquired and later to be lost in 1964. On the contrary, a comparison of PW11's analysis of the same area in 1964 and 1977 shows accretion and not erosion of the river bank between those years, thus putting the co-plaintiffs' plots at best in their 1964 location within the river bank in 1958 and at worst in the river, hence no NCR could have been acquired by the co-plaintiffs over their plots. Therefore, the failure of the co-plaintiffs' claim is not because they lost their NCR to the river bank reserve but because their claim for NCR is not proven or is defeated by the provision of s 38 of the Land Code. The position of the other plaintiffs is not however affected as they enjoy the benefit of the best 1964 location in the absence of evidence to show otherwise.

[44] For all the aforesaid reasons, we find no merit in any of the grounds of appeal submitted on behalf of the State or the co-plaintiffs in their respective appeals. We have no cause to interfere with the reasoning or conclusion of the learned JC. We therefore affirm his decision and dismiss both appeals with costs. Deposits are to be paid to the account of costs of the winning party.

State and co-plaintiffs' appeals dismissed with costs.

Reported by Loo Lai Mee